Supreme Court, U.S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

79-1974
No.

IN THE

Supreme Court of the United States

OCTOBER, 1979 TERM

LETTS INDUSTRIES, INC.,
Defendant-Petitioner,

vs.

RICKY WIERSEMA,
Plaintiff-Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

There are no published opinions in this case. The orders pertinent to this petition are:

(1) An order of the United States District Court for the Central District of Illinois granting respondent, Ricky Wiersema's motion for voluntary dismissal and dismissing the instant cause without prejudice;

(2) An order of the district court denying a motion by petitioner, Letts Industries, Inc., (hereinafter referred to as Letts), seeking vacation of the previous order of dismissal;

(3) An unpublished per curiam order of the United States Court of Appeals for the Seventh Circuit, affirming the order of the district court (F.2d); and

(4) An order of the court of appeals, denying Letts' petition for rehearing.

The respective orders of the district court are found at pages A-1 and A-2 of the appendix. The respective orders of the court of appeals are found at A-4 and A-9 of the appendix.

II. JURISDICTION

Pursuant to 28 U.S.C., Sec. 1254(1), petitioner seeks to invoke the jurisdiction of this Honorable Court to review a decision of the court of appeals which was entered in a civil case on February 29, 1980. A petition for rehearing was denied by the court in an order dated April 1, 1980.

III. QUESTIONS PRESENTED

(1) Whether petitioner's loss of the ability to compel the actual attendance of occurrence and medical witnesses at trial, the burden of defending a cause in a jurisdiction where case backlog will postpone the date of trial approximately three to four years, and the deprivation of trial in the locality where the incident occurred, are "plain legal prejudice" or "plain legal harm" within the meaning of federal case law, the existence of which requires a federal district court to deny a motion for voluntary dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure. (28 U.S.C., Rule 41(a)(2)).

(2) Whether the fact that plaintiff will suffer the same harm or prejudice by voluntary dismissal as will be suffered by defendant is relevant in determining whether the plaintiff's motion to dismiss should be granted.

IV. STATUTES INVOLVED

Rule 41(a)(2) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 41(a)(2), p. 467 (1976 ed.), which provides:

> (a) Voluntary Dismissal: Effect Thereof.
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

V. STATEMENT OF THE CASE

On July 18, 1977, respondent, Ricky Wiersema, an Illinois resident and employee of Moline Forge, Inc., of Moline, Illinois, lost a portion of his arm while oiling the die of a drop forging hammer. On October 31, 1978, Wiersema filed suit in the Circuit Court of Rock Island County, Illinois, against petitioner Letts, the distributor of the hammer. The complaint contained two counts, one sounding in strict products liability and one in negligence.

On November 29, 1978, petitioner Letts, a Michigan corporation with its principal place of business in Detroit, removed the case on the basis of diversity of citizenship (28 U.S.C., Secs. 1441 and 1332) to the United States District Court for the Central District of Illinois (Rock Island Division).

Once in federal court, the case moved with dispatch. Petitioner filed its answer to the complaint on December 5, 1978,

and nine days later the district court ordered that discovery be completed by April 1, 1979. Over the next several months a substantial amount of discovery was completed.

On March 1, 1979, respondent Wiersema was allowed to file an amended complaint which added as a party defendant the manufacturer of the hammer, Langenstein and Schemann A.G. (LASCO), a German corporation. A final pretrial conference which had been set for July 3, 1979, was changed to a special pretrial conference. At that conference the district court heard arguments of counsel on the manufacturer's motion to quash summons and dismiss and reestablished October 1, 1979, as the date for completion of discovery by all parties.

On July 17, 1979, respondent Wiersema filed a motion for voluntary dismissal pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. In that motion, Wiersema asserted that there was a serious question whether the manufacturer was subject to *in personam* jurisdiction in the courts of Illinois but that both defendants would be subject to *in personam* jurisdiction in the courts of the State of Michigan, where he intended to refile against them upon the granting of a voluntary dismissal.[1] On the following day, the district court entered an order allowing the motion and dismissed the case without prejudice.

Shortly thereafter petitioner Letts filed a motion to vacate the order of dismissal, setting out with particularity the various ways in which it would be prejudiced as a result of the order.

---

[1] Respondent Wiersema did refile in Michigan in the Circuit Court for the County of Wayne (Detroit, Michigan); however, the assertion which formed the basis for the motion for voluntary dismissal proved to be unfounded. On November 27, 1979, the Michigan court found that the statutory requirements necessary to subject the manufacturer LASCO, to the general personal jurisdiction of the State of Michigan, were not satisfied and entered an order quashing service of process and dismissing LASCO from the cause with prejudice. Wiersema did not appeal this final order.

These elements of harm, which made the entry of the order of dismissal error, were also presented to the court of appeals and will be described fully herein. On July 25, 1979, the district court entered an order denying this motion.

Pursuant to 28 U.S.C., Sec. 1291, petitioner Letts took a timely appeal from the district court's orders to the United States Court of Appeals for the Seventh Circuit. Noting that in considering a dismissal without prejudice, it is the position of the defendant which should be protected, and that such a dismissal should not be granted if the defendant will suffer some "plain legal prejudice," Letts argued that the district court abused its discretion in allowing Wiersema's motion since Letts would in fact suffer such prejudice. As argued to the court of appeals, the particular items of legal prejudice which Letts was forced to suffer as a result of the order of dismissal were: (1) the loss of the ability to compel the attendance at trial of occurrence and medical witnesses, all of whom are Illinois residents; (2) the burden of defending a cause in a jurisdiction where case backlog will postpone the date of trial approximately four years from the time it would have been tried in the federal court; and (3) the deprivation of trial in the locality where the incident occurred.

On February 29, 1980, the court of appeals affirmed the order of the district court in an unpublished per curiam order. Although it is not entirely clear from the order, the court apparently held that even if the three consequences suffered by defendant amounted to "plain legal prejudice", a denial of Wiersema's motion to dismiss was not required because the prejudice would fall equally upon both Letts and Wiersema.

Petitioner Letts filed a timely petition for rehearing which the court of appeals denied by order dated April 1, 1980. Petitioner then prepared the instant petition for writ of certiorari.

VI. REASONS FOR GRANTING THE WRIT

This case presents substantial questions with respect to the rights acquired by a defendant after suit is filed.

Although cases involving voluntary dismissals under Rule 41(a)(2) are legion, there are none providing meaningful guidance on what harm qualifies as "plain legal prejudice" under the facts of this case. This lack of authority, in itself, provides a strong reason for this court's review of petitioner's case.

In addition, it is important that this court review the lower court's decision since it clearly evidences an intent on the part of the Seventh Circuit Court of Appeals to ignore settled federal case law concerning when it is improper for a court to allow a plaintiff to obtain a voluntary dismissal of his cause without prejudice. It is further crucial that this court consider the issue now since under the approach applied by the court of appeals in this case, virtually every opposition in the future of a defendant to a motion for voluntary dismissal will be unsuccessful no matter how substantial or weighty the rights lost.

There is no dispute that the general rule applicable to motions for voluntary dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure is that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit. E.g. *Stern* v. *Barnett,* 452 F.2d 211 (7th Cir. 1971); *LeCompte* v. *Mr. Chip, Inc.,* 528 F.2d 601 (5th Cir. 1976). Although there is scant case law providing guidance as to what harm suffered by a defendant is sufficient to bring a case within the exception to the general rule and require a denial of the motion,[2] it is clear that Rule 41(a)(2) was designed to protect the interests of the defendant. *LeCompte,* 528 F.2d at 604. For example, it has been stated, "the crucial question to be determined is, would the defendant lose any substantial right by the dismissal." *Durham* v. *Florida East Coast Ry. Co.,* 385 F.2d 366, 368 (5th Cir. 1967).

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[2] *Tyco* v. *Koppers Co. Inc.,* 82 F.R.D. 466, 468 (E.D. Wis. 1979) (Judicial gloss on phrase "plain legal prejudice" is somewhat thin).

In direct opposition to these longstanding rules of federal case law, the Circuit Court of Appeals for the Seventh Circuit refused to decide whether Letts was, in fact, deprived of substantial rights as a result of the dismissal. Instead it affirmed the district court on the basis that the plaintiff would also suffer the same losses.

There is absolutely no authority to support this approach. The law with respect to dismissals under Rule 41(a)(2) has never been that the defendant must suffer the loss of whatever substantial rights the plaintiff is willing to deprive himself of. It is the prejudice to the defendant, not the plaintiff, which is relevant. Moreover, as suggested above, the non-analysis of the court of appeals could be applied to the same end in virtually every dismissal situation, including those which the courts over the years have found to require denials of the motions. Should this order be allowed to stand, the approach of the court will dictate that the defendant will lose in every challenge to a motion for voluntary dismissal.

Although no other court has determined whether the rights which petitioner will lose as a result of the instant dismissal are substantial enough to require the denial of a motion for voluntary dismissal under Rule 41(a)(2), there is ample authority in cases applying the doctrine of *forum non conveniens* to fully support Letts' claim that its loss amounts to some "plain legal prejudice."

Before discussing this further, it would be appropriate to establish the factual background for this issue. Plaintiff's answers to interrogatories propounded by Letts, which are part of the record in this case, establish that all of the potential medical and occurrence witnesses are located in Illinois. Consequently, they could not be compelled to attend trial by Letts in Michigan. Moreover, since Detroit is located at some distance from the Moline area it is unlikely that occurrence witnesses would willingly assume the hardships necessary to attend the trial on their own initiative. Although evidence depositions

could be obtained, their use is clearly not as satisfactory as a witness' actual appearance before the jury. *Mergenthaler Linotype Co.* v. *Leonard Storch Enterprises,* 66 Ill.App.3d 789, 802, 383 N.E.2d 1379, 1389 (1978). In addition, the hammer which is the subject of the present litigation remains located in Moline, Illinois at Moline Forge, Inc.

With respect to the issue of trial delay, it is apparent from the facts of this case that trial would have been had in the federal district court during 1980. October 1, 1979, had been set as the date for completion of discovery by all parties. In the relatively clean docket of the district court, final pretrial conference and trial would have followed closely upon the completion of discovery. As was stated by the Third Circuit Court of Appeals in reversing the allowance of a Rule 41(a)(2) motion on facts similar to the present case:

> Given a court order requiring that parties complete discovery within 60 days, the litigant has a right to expect a trial on the merits within a reasonable time thereafter. *Ferguson* v. *Eakle,* 492 F.2d 26, 30 (3d Cir. 1974).

Lett's common sense approach and conclusion is supported by statistics of which this court may take judicial notice. *Management Statistics for United States Courts 1979* (Adm. Off. of U.S. Courts), p. 80, indicates that for the twelve-month period ending June 30, 1979, the median time from issue to trial in civil cases in the United States District Court for the Central District of Illinois was 18 months. Since Letts filed its answer December 5, 1978, this case probably would have been tried by June of 1980 if it were progressing in an average manner. In fact, it appears that this case was moving faster than average.

As a result of the instant dismissal, the prospective time of trial has been set back drastically. The Circuit Court for the County of Wayne, Michigan, besides having no direct connection to this occurrence, has a case backlog which creates a long delay before trial. A recent research project on trial court delay

concluded by the National Center for State Courts under a grant from the Law Enforcement Assistance Administration indicates that the median time for civil cases from filing to commencement of jury trial in that court is 1,231 days or approximately 41 months. Church, *Civil Case Delay in State Trial Courts,* 4 Justice System Journal 166, 182. Based on the Michigan filing date of July 13, 1979, although the complaint against Letts has been dismissed and held in abeyance during the pendency of federal appeals, it would appear that the present case would not have gone to trial until at least December of 1982 to January of 1983 even if it had progressed in a normal manner. Moreover, an affidavit of a Detroit attorney which is part of the record in this case indicates that in July of 1979 the Clerk of the Wayne County Circuit Court stated that the filing to trial period at that time was four and one-half years, over a year longer than the median indicated by the Center's project.

As already stated, the court of appeals in effect refused to consider whether the right to compel the attendance of witnesses and to have one's case tried in a forum which is closely connected to the litigation and the sources of evidence and which has a docket that will allow the case to be tried relatively quickly, are substantial rights the loss of which would result in plain legal prejudice to the defendant. Petitioner believes they are and asserts that if the loss of these rights are not plain legal prejudice then nothing is.

It would be difficult to conceive of any matter which is more basic to the integrity of our legal system than the opportunity of a party to fully and adequately present his position at trial. This opportunity is severely diminished if the defendant may not compel the attendance of occurrence witnesses and is forced to manage his case from a place far removed from the incident and the sources of evidence. In addition, Letts has a legitimate interest, as does every citizen, in judicial economy and fairness. Judicial economy and fairness are not served by taking the case from an area where the incident occurred and a relatively

prompt trial may be had to a congested metropolitan area which has little connection to the incident where trial will be unduly delayed.

This court and the courts of Illinois have long recognized the substantial nature of these interests and their importance as factors to be weighed in applying the doctrine of *forum non conveniens.* The following quotation from *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508-509 (1947) demonstrates this:

> [T]hose [factors] to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . .
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.

See also *People ex rel Compagnie Nationale Air France* v. *Giliberto,* 74 Ill.2d 90, 110-111, 383 N.E.2d 977, 985-986 (1978).

There is no reason why the foregoing factors should not apply in determining whether a defendant will suffer some plain legal prejudice by reason of a voluntary dismissal without prejudice. All of the factors are present in the instant case and it is submitted that the questions presented are of such substantial importance in determining the rights of litigants and judicial economy as to warrant review by this court.

VII. CONCLUSION

The petitioner herein has suffered some plain legal prejudice as a result of the district court's allowance of respondent's motion for voluntary dismissal. The Circuit Court of Appeals for the Seventh Circuit, in affirming the district court's order, ignored settled federal case law and applied a form of balancing analysis which has no precedent in the law with respect to Rule 41(a)(2) motions and dictates that the defendant always loses. In order to do justice in this case and prevent the court of appeals from prejudicing the rights of other defendants in the future, this court should grant a Writ of Certiorari to review the decision of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

(District Court's Order Endorsed on Motion for Voluntary Dismissal)

Upon consideration, the foregoing motion is allowed. Case dismissed without prejudice.

Morgan, J.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 78-4056

Ricky Wiersema,

Plaintiff,

v.

Letts Industries, Inc., et al.,

Defendants.

ORDER ON MOTION TO VACATE

(Filed July 25, 1979)

Upon consideration of motion by defendant, Letts Industries, Inc., that order of dismissal herein dated July 18, 1979, be vacated, it is apparent that said motion should be denied. It is not "forum shopping" to file a lawsuit in any court of plaintiff's choice in which he believes he can obtain personal jurisdiction of the defendants he wishes to sue and which has jurisdiction of the subject matter of his suit. It is not unreasonable to dismiss and start over if he decides an error may have been made in this regard.

While defendants may be put to some slight extra expense in employing successive defense lawyers in this situation, the argument that "all of the expense incurred [here] will have been wasted and the effort employed in consulting with his attorneys, * * * [in this district], will have to be duplicated with new attorneys" is either frivolous or suggests incompetence of at least one set of such successive counsel. There is no justification for ordering plaintiff to pay any part of said defendant's expenses to date. It is plaintiff's problem to obtain jurisdiction and,

finally, a judgment; and unless and until he does so, defendants are winning the case. Nothing advanced in support of said motion is persuasive.

Accordingly, IT IS ORDERED that said Motion to Vacate Order of Dismissal and Reconsider is DENIED.

/s/ Robert D. Morgan
United States District Judge

Entered: July 25, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted: February 22, 1980
February 29, 1980

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

Ricky Wiersema,

Plaintiff-Appellee,

No. 79-1951 vs.

Letts Industries, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
For The Southern District of Illinois,
Rock Island Division.
No. 78-C-4056
Robert D. Morgan, **Judge.**

ORDER

On July 18, 1977, the plaintiff, Ricky Wiersema, an Illinois citizen, while working at Moline Forge, Inc., of Moline, Illinois, lost a portion of his right arm when it was caught in a die in a drop-forging hammer. On October 31, 1978, he filed a complaint in the Rock Island County Circuit Court against the hammer's distributor, Letts Industries, Inc., under theories of strict liability and negligence. On November 29, 1978, Letts, a Michigan corporation with its principal place of business in

Detroit, removed the action to the United States District court for the Central District of Illinois, Rock Island Division, on the basis of diversity. Letts filed its answer and defenses to the complaint on December 6, 1978. On December 14, the court ordered that all discovery was to be completed by April 1, 1979.

On March 1, 1979, the court allowed Wiersema to add the hammer's manufacturer, Langenstein and Schemann, A.G. (LASCO), a German corporation, as a defendant. A foreign summons was served upon Charles E. Letts, Jr., of Letts Industries, as LASCO's United States Agent. The return was filed on June 5. LASCO moved to quash the return for insufficiency of service and to dismiss the action against it for lack of personal jurisdiction. It submitted a supporting memorandum, English and German copies of its contract with Letts Industries, and the sworn affidavits of Charles E. Letts and Charles Van Dusen stating that Charles Letts is neither LASCO's registered nor its *de facto* agent.

A special pretrial conference was held on July 3 with all parties appearing by their counsel. On July 17, Wiersema moved for a voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(2). The basis of the motion was that after filing the complaint, in the course of the discovery proceedings, Wiersema learned that he had a cause of action against LASCO, that there was a "serious question" whether LASCO is subject to personal jurisdiction in Illinois, and that apparently LASCO is subject to personal jurisdiction in Michigan. On July 18, the court granted Wiersema's Motion without requiring him to compensate Letts for the expenses and costs it had incurred.[1] Letts unsuccessfully moved to vacate the dismissal order. It then brought this appeal. Wiersema has moved pursuant to Circuit Rule 15 to affirm the dismissal order.

---

[1] Prior to the district court's dismissal, the following occurred. Wiersema propounded three sets of interrogatories to Letts, the answers to which were all filed. Letts propounded two sets of inter-

A trial court's decision to grant the plaintiff a dismissal without prejudice after the defendant has filed an answer will not be overturned absent an abuse of discretion. *Stern* v. *Barnett,* 452 F.2d 211 (7th Cir. 1971); *cf.* Fed. R. Civ. P. 41(a)(2); *See Generally Moore's Federal Practice,* ¶ 41.05[3]; Wright & Miller, *Federal Practice and Procedure,* § 2364. Such a dismissal is proper "unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Stern, supra,* 452 F.2d at 213. *See Generally* Note *Voluntary Dismissal By Order Of Court - Federal Rules of Civil Procedure Rule 41(a)(2) and Judicial Discretion,* 48 Notre Dame Law. 446 (1972) (collecting cases).

In *Grivas* v. *Parmello Transp. Co.,* 207 F.2d 334 (7th Cir. 1953), a case strikingly similar to this, an Illinois citizen sued a foreign corporation in tort in the Cook County Illinois Circuit Court. The defendant removed to the United States District Court for the Northern District of Illinois on the basis of diversity. After removal, the plaintiff learned that he also had a cause of action arising out of the same incident against an Illinois resident who could not be made a defendant in the diversity action. The plaintiff unsuccessfully sought a voluntary dismissal in the district court so that he could join both defendants in one action in the state court. This court held that although the plaintiff did not have an absolute right to a dismissal, he had an interest sufficient to merit granting one as a matter of discretion. In this case, dismissal was predicated upon the same circumstances that were present in *Grivas.*

Letts argues that the factors employed in the application of the doctrine of *forum non conveniens, see, e.g. Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947), are applicable to this case. We disagree. Those factors are aids to choosing between two

---

rogatories to Wiersema, and Wiersema's response to the first set was filed. The deposition of Wiersema was taken. Both sides produced various documents in response to requests for them. Also, Wiersema's complaint was amended and Letts filed its amended answer.

forums in which venue is proper and in which jurisdiction over the parties and subject matter attaches. Here, Wiersema arguably can proceed against both Letts and LASCO in only one jurisdiction: Michigan.[2] Even if the *Gulf Oil* factors are apposite, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," 330 U.S. at 508. Letts simply has not shown that the balance is strongly in its favor.

The examples of "legal prejudice" that Letts alleges resulted from the dismissal are the following: that in Michigan it will not have the aid of compulsory process in securing the attendance of occurrence and medical witnesses from Illinois; that it will be forced to wait four and a half years for a trial because of docket congestion in Michigan; and that it has been deprived of a trial in the locality in which the incident occurred. The first two claimed prejudices fall at least equally upon both Letts and Wiersema, who bears the burden of proof in this action. Furthermore, as Letts readily admits, the testimony of witnesses unwilling to travel may be presented by depositions. Finally, it is anomalous for Letts to protest so strongly to having to defend this action in its own backyard, rather than where Wiersema's gruesome injury occurred. *Compare e.g. Le Compte* v. *Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) (reversing Rule 41 (a)(2) dismissal upon the plaintiff's appeal because conditions unduly restricting his right to bring another action constituted "legal prejudice").

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[2] Letts contends that LASCO is subject to personal jurisdiction in Illinois. It reasons as follows: (1) a tort is committed where the injury occurs; (2) Wiersema's injury occurred in Illinois; (3) therefore, LASCO committed a tort in Illinois; (4) under Illinois law, which governs the personal jurisdiction issue in the current venue of this case, one who commits a tort in Illinois is subject to personal jurisdiction there; and (5) LASCO has enough contact with Illinois that subjecting it to personal jurisdiction there would not offend due process. Of course, we need not resolve this jurisdictional issue in this appeal.

Finally, Letts contends that even if the dismissal itself was proper, the court should have ordered Wiersema to pay Letts' attorney's fees and costs. Assessment of such costs would have been appropriate. *Le Compte, supra; cf.* Fed. R. Civ. P. 41(a)(2). However, the court's failure to assess them was not an abuse of discretion.

For the reasons given above, the order of the district court is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 1980

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

Ricky Wiersema,

Plaintiff-Appellee,

No. 79-1951 vs.

Letts Industries, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois,
Rock Island Division.
No. 78-C-4056
Robert D. Morgan, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant Letts Industries, Inc., all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
AUG15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1974

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LETTS INDUSTRIES, INC.,
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On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 79-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LETTS INDUSTRIES, INC.,
Petitioner,
vs.
RICKY WIERSEMA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Contrary to Petitioner's assertion that there is a dearth of meaningful precedent establishing guidelines for Rule 41(a)(2)[1] dismissals, the questions presented by

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[1] Rule 41(a)(2) of the Federal Rules of Civil Procedure reads in its entirety as follows:

> (2) *By Order of the Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall

(cont'd. on following page)

Petitioner have already been answered by this Court. Moreover, the issue itself is not one susceptible to the formulation of a uniform rule for universal application; and, in consequence, the implementation of the Rule is best left to the discretionary decision of the District Courts supervised by the Circuit Courts of Appeal. None of the traditional bases for the granting of a writ of certiorari exist in this case. No Constitutional issue is raised; nor does this case present problematic questions of a recurring nature; nor those which have proven particularly troublesome to the Circuit Courts of Appeal over time. No conflict of Circuits is asserted.

For these reasons, it is respectfully submitted that certiorari is improvident in the context of the case at bar.

ARGUMENT

The Petition for Writ of Certiorari in this case should be denied for the following reasons:

1. In the case at bar, the Petitioner has not raised any new or novel questions of law, nor any question of law not heretofore comprehensively reviewed and answered in *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86 (1923), and *Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1935).

(cont'd. from preceding page)

> not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

In *Ex Parte Skinner & Eddy Corp., supra*, 265 U.S. at 93-94, Chief Justice Taft spoke for a unanimous Court when he wrote:

> At common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, and this right has been declared to be substantial. . . .
>
> It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing. *McGowan v. Columbia River Packers' Assoc.*, 245 U.S. 352, 358, 62 L. Ed. 342, 345, 38 Sup. Ct. Rep. 129. In *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U.S. 138, 146, 43 L. Ed. 108, 112, 18 Sup. Ct. Rep. 808, this statement of the rule in *Detroit v. Detroit City R. Co.*, 55 Fed. 569, was approved: "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 109 U.S. 702, 27 L. Ed. 1081, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."
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> * * *
>
> The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons, or may not have given the real one, cannot affect his right. [citations omitted]

The District Court and the Seventh Circuit, on review, found on the facts, that the Petitioner had failed to show any particularized prejudice and that the litigation had not proceeded so far that it would be unreasonable to terminate it and recommence it in a separate forum.[2]

2. Of necessity, the determination of a motion to dismiss pursuant to Rule 41 of the Federal Rules of Civil Procedure is confined to the broad judicial discretion of the District Courts because "[n]o one single factor controls . . . [and] each case must be examined in its own factual circumstances." *SEC v. Everest Management Corp.*, 466 F. Supp. 167, 171 (S.D. N.Y. 1979) [applying Rule 41(b)]. In order to constitute an abuse of that discretion, there must be shown "arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances." *Home Owners Loan Corp. v. Hoffman*, 134 F. 2d 314, 317 (8th Cir. 1943).[3] Indeed, Rule 41(a)(2) permits voluntary dismissal even *during trial*, " 'where the court believes that although there is a technical

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[2] "A Court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Hoffa v. United States*, 385 U.S. 323, 348 (1966) (Douglas, J. concurring)

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[3] Only recently, in *Curtiss-Wright Corp. v. General Electric Co.*, — U.S. —, 64 L. Ed. 2d 1, 12 (1980), this Court emphasized in interpreting Rule 54(b) that "the discretionary judgment of the District Court should be given substantial deference . . ." In a similar balancing context, the Court went on to say, in a vein equally applicable here, "because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district court to follow." 64 L. Ed. 2d at 13. The same conclusion should obtain here.

failure of proof there is nevertheless a meritorious claim.' " *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 n.5.

Petitioner does not provide a compelling demonstration of "arbitrary action" in either court below; rather, in balancing the legal and equitable factors inherent in the determination of a Rule 41(a)(2) Motion, the District Court and the Seventh Circuit, on review, simply found the balance lay in Respondent's favor.

3. As emphasized by Professor Moore in his treatise, the test is whether the defendant in the court below will suffer "substantial prejudice." 5 Moore, *Federal Practice* (2d Ed. 1979), Paragraph 41.05[1], pp. 41-73. Petitioner's arguments in the case at bar clearly fail to meet this benchmark. Moreover, it is clear that the prejudice contemplated must be articulated with particularity, not merely alleged generally, and must be more than merely present in some degree to justify appellate intervention.

4. None of the traditional premises on which certiorari has been considered appropriate historically exist in the case at bar. That is, Petitioner does not claim that the decision of the Seventh Circuit in the instant case is in direct conflict on an important question, much less demonstrably or irreconcilably so, with any cited opinion of this Court, nor any of another Circuit. *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). There is no suggestion that the issue is a recurring one which will trouble other circuits or that if modification is believed needed (which Respondent does not concede), it will not come of its own force through *en banc* consideration within the Seventh

Circuit.[4] The nature of the issue forecloses the possibility of the pronouncement of an uniform rule on the point and that aspect of the case strongly suggests that Petitioner's Statement of Reasons for Granting the Writ harken more to the writ of error under the former practice[5] than to modern use of the writ of certiorari. On this point the members of this Court have frequently reiterated, formally and informally, that "the perceived correctness of the judgment" *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), below is not, alone, a sufficient basis for review. J. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. B.A. 541, 551 (1958); Vinson, *Address Before the American Bar Association*, 59 S. Ct. v, vi (1949).

It is not claimed that, in the case at bar, the Seventh Circuit failed to correctly apply a prior decision of this Court through error or oversight, or that it misperceived, misapplied or misconstrued some prior opinion of this Court. It is not suggested that any prior precedent is ripe for reexamination or that it is now timely to review a question expressly reserved for future consideration. There is no asserted conflict

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[4] To the extent Petitioner implies a conflict between the two cited decisions of the Seventh Circuit, it was incumbent upon the Petitioner to assert the conflict and to seek resolution of the issue through *en banc* review since "it is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*). Petitioner did not allege internal conflict as a basis for granting its Suggestion for Rehearing and Rehearing En Banc; and, it is noteworthy that *not a single member* of the Seventh Circuit, in active service, voted to grant a rehearing of the matter.

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[5] Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978), § 4.1, pp. 254-257.

between a State court of last resort and a Federal Court on either a Federal or nonfederal question. Moreover, there is no reason given why the issues in this case would impact on any group or class of persons beyond the parties in this case. Clearly, no question of Constitutional magnitude is involved.

Again, Petitioner seems intent upon resurrection of the writ of error, rather than properly seeking a writ of certiorari. Such a course would be disastrous since it would take this Court away from its Constitutional mission and motivate the additional resort to certiorari as a means of final review of the facts and an additional discussion of specific facts or issues resolved below adversely to the petitioning party. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The torrent must seem great enough for petitions brought on established grounds without the claimed "non-analysis"[6] of a Court of Appeals to be added to the list. The question presented is not identical with, nor similar to, an issue in a case now pending before the Court.

5. It is respectfully submitted that the Court of Appeals was completely correct in determining that the doctrine articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) is not germane to the case *sub judice*. When a defendant is sued in the forum in which it maintains its principal place of business, a presumption arises that that is a convenient forum. 1 *Restatement of Conflicts* 2d (1971) § 84, p. 253. As pointed out by the District Court in *Swanson v. Badger Mut. Ins. Co.*, 275 F. Supp. 544, 548 (N.D., Ill. 1967), the fact that a defendant has chosen to do business in the particular District

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[6] Petition for Writ of Certiorari, p. 7.

reinforces the conclusion that there is not inconvenience of sufficient weight to justify a change in venue. And, in consideration of venue questions, it is not for the defendant to rely on the inconvenience to the plaintiff or to the plaintiff's witnesses to support its bid for change of venue. *Holiday Rambler Corp. v. American Motors Corp.*, 254 F. Supp. 137, 139 (W.D. Mich. 1966). Moreover, the Petitioner has totally failed to satisfy the test of "actual hardship" under the doctrine. *See, e.g., Burrington v. Ashland Oil Company*, 356 A. 2d 506, 509 (Vt. 1976); *Radigan v. Innsbrook Resort & Golf Club, 150* N.J. Super. 427, 375 A. 2d 1229, 1231 (1977) (*per curiam*).

But to state these arguments is to make clear that the issue of venue, if pertinent at all, is better left to adjudication and review by the Michigan Courts, rather than by this Court. Petitioner does not make any claim that it would not, or could not, receive a fair hearing on this issue, or on the merits, from the Michigan courts.

6. There is no basis for believing that the lower Courts are not competent to dispose of future questions arising under Rule 41(a)(2) in the absence of further guidance from this Court. Indeed, the parameters of the Rule seem well-established. *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D. N.Y. 1953); *Jackson v. New York & Cuba Mail S.S. Co.*, 18 Fed. R. Serv. 41 a. 22, Case 1 (S.D. N.Y. 1953); *Klar v. Firestone Tire & Rubber Co.*, 14 F.R.D. 176 (S.D. N.Y. 1953); *Grivas v. Parmello Transp. Co.*, 207 F.2d 334 (7th Cir. 1953).

The instant case is simply one which does not merit plenary consideration by this Court.

CONCLUSION

The Petition for writ of certiorari addressed to the Seventh Circuit United States Court of Appeals should be denied.

Respectfully submitted,

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Dated: August 12, 1980